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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. [redacted] 3

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 494

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE FACTS

The petitioner's purported statement of facts hardly reflects the record. It is rather a statement of petitioner's conclusions as to the proper construction and effect of its undertaking. We therefore feel obliged to re-state the facts.

Originally the lower state court entered a *joint* judgment against the Singer Sewing Machine Company and Anderson. No several liability was adjudged against either. (R. 1-2.)

The Singer Company and Anderson took a ***single, joint appeal*** to the Supreme Court of Idaho, by notice which recited that such appeal was from the *whole* of the judgment. (R. 3.) The American Surety Company, petitioner here, prepared, executed and filed in the lower court its supersedeas undertaking. This was done pursuant to *Section* 7155, *Idaho Compiled Statutes.* (Appendix, p. 14.)

Obviously, there was only one appeal from the judgment. In the preliminary recitals of its undertaking, the surety company referred to the appeal *as though* the Singer Company had taken it *alone.* As above shown, this recital was at variance with the record facts.

However, the undertaking went on to provide that the appeal to which it referred was in fact *from the whole of said judgment.* (R. 16.) This statement was correct, as shown above. Then, as the consideration to it for the obligation of said undertaking, the surety company called for a stay of execution of *said* judgment *so* appealed from. (R. 19.)

Thus, when the undertaking and the record to which it referred and which it accompanied were consulted together, it appeared rather plainly that the undertaking referred to a single, joint appeal from the *whole* of the joint judgment, and demanded that execution be stayed as to the whole judgment so appealed from.

The undertaking then went on to provide that if the said judgment, *or any part thereof*, should be affirmed, the surety company would be responsible for its payment. (R. 19.)

It was affirmed in part, as against Anderson. (R. 14.)

Thereafter, the statutory period of thirty days having passed without payment of the judgment, the judgment creditors, respondents here, proceeding in accordance with the terms of the statute and the provision in the supersedeas undertaking as well (R. 19, f. 21), moved the lower court, in which the undertaking reposed and to which the judgment of the Supreme Court had been remitted, for judgment against the surety company on the undertaking. This motion was granted and the judgment entered on June 23, 1930. The judgment itself recites the facts up to that date quite fully and exhibits the construction placed upon the surety company's contract by that court. (R. 18-20.)

We suggest here that petitioner's statement that this judgment was inadvertently entered, is not persuasive. It is not in accord with the record. The judgment itself not only shows the court's judicial conclusion as to the legal effect of petitioner's contract set forth in the undertaking, but also shows how that conclusion was reached.

On June 26, 1930, petitioner filed its motion to vacate such judgment, setting forth in full the grounds on which it relied at that time. (R. 22-24.) Such motion was based on the records in the action in state court, plus the affidavit of one of the surety company's counsel. That affidavit dealt largely with a pending execution sale which is not involved here, and further set forth that the surety company had not had

notice of the proceeding against it which had led to said judgment. (R. 28.) The motion raised no Federal question.

The lower court sustained the motion on the ground that the judgment was *void*. (R. 32-33.)

On the appeal of these respondents, judgment creditors there, the Idaho Supreme Court reversed the lower court. *Am. Surety Co. v. Baldwin, Idaho* (Not yet Rep.), 299 *Pac.* 341. Its opinion appears in this record in full. (R. 46-55.) After pointing out that the judgment would be void *only* in case of lack of jurisdiction in the lower court, either of the surety company or of the subject matter presented to the lower court by the motion for judgment on the undertaking, the Supreme Court said:

> "The surety company did not claim error, and appeal. It did not claim inadvertence or mistake. It challenged the court's jurisdiction and moved to set aside the judgment as void. The whole question here is a question of jurisdiction. Nothing further. Nothing else.
>
> "If a court has jurisdiction of the parties, jurisdiction of the subject matter and jurisdiction of an issue of law or fact presented, then its judgment upon that issue is not void whether erroneous or not. Such judgments in the absence of mistake or, in a proper case, motion for new trial, may be corrected only by appeal." (R. 50, f. 149.)

Its holding is summed up in the following quotation from the opinion:

> "The question or issue presented was, did the Surety Company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the Supreme Court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had jurisdiction of this question. It construed the bond in favor of appellants and against the Surety Company. It was not only in that court's power, but it was its duty, to decide the question submitted. *In re* Clerf (Wn.), 104 Pac. 622; Windfrey v. Benton

(Okla.), 106 Pac. 853. Whether it decided right or wrong its decision was a judgment which could be reviewed for error, if there was error, only by this court on appeal." (R. 54, ff. 160-161.)

SUMMARY OF POINTS AND AUTHORITIES

I.

FEDERAL QUESTION RAISED TOO LATE

Alluding briefly to petitioner's citation of authority on its Second Point, it hardly meets the situation. We submit that this application for review is not within the exception to the general rule stated in *Missouri ex rel. v. Gehner.* There this court said that the petitioner

> *"at the first opportunity,* invoked the protection of the Federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States." (Italics ours.)

In short, this court held that the state statute there in question apparently did not infringe until the state court announced its *construction* thereof.

Here, petitioner had every opportunity that the law affords to raise the Federal question. It could have presented the question in its motion attacking the judgment in the lower court. (R. 22-24.) It could have appealed from the judgment and there have presented the question to the State Supreme Court.

Idaho Comp. Statutes, Secs. 7151, 7152, *Appendix.*

It did neither. The constitutional objection was never raised in any court until, apparently, it was suggested to petitioner by the dissenting opinion herein filed by one member of the Idaho Supreme Court. (R. 63, f. 188.)

We submit that this matter falls squarely within the rule of *Citizens Nat'l Bank v. Durr,* 257 *U. S.* 99, 106. This is not an instance of a decision which could not have been anticipated. The very question at issue was the jurisdiction of the lower state court. This petitioner, by asserting that the judgment was void, itself was the author of that question. Surely, a litigant should be bound to anticipate an adverse decision

as well as one favorable to him; and surely, it is his duty, where he himself takes the initiative, as here, to present in support of his own proposition those matters of law, whether constitutional or statutory, upon which he expects to rely. If so, this petition should be denied.

II.

NOTICE TO SURETY NOT REQUIRED

The proceeding complained of was had under an Idaho statute. That statute provides for a supersedeas undertaking to stay execution of a money judgment on the condition that if such judgment or any part thereof be affirmed the appellant will pay it as affirmed, and if not so paid within thirty days, judgment may be entered against the surety for such amount, on motion of the judgment creditor.

Idaho Comp. Statutes, Sec. 7155, *Appendix.*

In holding notice of the motion for judgment unnecessary, the Idaho Supreme Court was merely applying an Idaho statute. Also, it was giving effect to an agreement for such summary judgment, which the surety company had incorporated into the undertaking in question.

(R. 7, f. 21.)

Petitioner first contends *(Petition, page 4)*, that the proceeding for judgment on its undertaking failed of due process in that it was not notified of the motion for judgment.

Conceding that this presents a proper subject for inquiry (if it be first held that this application is entitled to be heard at all), the Idaho Supreme Court merely followed an unbroken line of authority, so far as the state courts are concerned.

While the decisions in most of the states are not of any assistance because only a few states have statutes that are the equivalent of the Idaho statute *(Sec. 7155, Appendix)*, the authorities in point will be found to support the Idaho decision, and to be based on the same statute, or its equivalent.

Gray v. Cotton, 174 Cal. 256;
Portland Trust Co. v. Havely, 36 Ore. 234;
Jewett v. Shoemaker, 124 Iowa 561;

Meredith v. S. C. M. A. of Baltimore, 60 Cal. 617;
Hawley v. Gray Bros. etc. Co., 127 Cal. 560;
Shannon v. Dodge, 18 Colo. 164.

The Ninth Circuit Court of Appeals has held likewise.

U. S. F. & G. Co. v. Fort Misery Highway District, 22 Fed. (2d) 369, 373.

The Federal District Court for Idaho recently followed the Ninth Circuit Court of Appeals, in proceedings in which this petitioner is seeking to enjoin these respondents from enforcing the judgment of which it here complains.

American Surety Company v. Baldwin, et al., 51 Fed. (2d) 596; (Adv. Sh., October 12, 1931).

This court has not, we think, decided the question of notice in any case arising under a statute like Idaho's. In one case the question was presented to this court but it was found unnecessary, because of another feature of the case, to pass upon the matter of notice to the surety. This court, however, pointed out that it was doubtful that notice to a surety is necessary, citing two of its former decisions.

Pease v. Rathbun-Jones Eng. Co., 243 U. S. 273, 279.

The cases there cited were, in principle, the same as the case at bar. They were:

United Surety Company v. Am. Fruit Prod. Co., 238 U. S. 140;

Johnson v. Chicago & P. Elev. Co., 119 U. S. 388, 400-401.

In the first, this court considered a state statute, and a supersedeas undertaking given pursuant thereto, which, like the Idaho Statute as construed by the Idaho Supreme Court, permitted judgment against the surety to be entered without notice. This court said:

> "That a man may contract to be bound by a judgment in which he has no right to be heard, and that a statute may authorize him to make himself a party to such a judgment, was decided, if it needed a decision, in *Beall v. N. Mex.*, 16 *Wall.* 535, 21 *L. Ed.* 292."

The second announced substantially the same rule.

Petitioner's Authorities Not in Point

As we read the two cases cited on due process of law by petitioner, one of them merely holds that, where *a matter of fact* going to the jurisdiction of a state court was not actually litigated and adjudicated in the state where the judgment was rendered, the judgment debtor may plead and litigate such matter in a suit on such judgment in another state, *as an issue of fact. (Nat'l Exchange Bank v. Wiley.)* The decisions of the Ohio Court there considered are not criticized, but on the contrary.

The other *(Chicago Life Ins. Co. v. Cherry)*, as we read it, holds that where such jurisdictional fact *was* litigated in the state of original jurisdiction, it cannot be litigated again in a suit on the judgment in a foreign state. It seems to us that the portion of this latter opinion applicable here is,

> "But when the power of the court in all other respects is established," (as here) "what acts of the defendant shall be deemed a submission to its power is a matter upon which states may differ."

We submit the statement of the rule in this case as opposed to petitioner's claims.

Petitioner Was Not Denied Its Day in Court

As a further consideration in the matter of due process, this surety company has had its day in court, witness its attack on the judgment by its motion in the lower court and the proceedings had on appeal in the Idaho Supreme Court.

Further, as pointed out in the decision of the Idaho Supreme Court (R. 50, f. 149), petitioner plainly had a right to appeal from the judgment, and thereby have it reviewed for error. That right is common in Idaho to every party litigant who feels himself aggrieved by a judgment.

Idaho Comp. Statutes, Secs. 7151, 7152, *Appendix.*

Also, as further pointed out by the Idaho Supreme Court, petitioner had a right to seek relief from the judgment on the grounds of mistake, inadvertence, surprise or excusable neglect.

Idaho Comp. Statutes, Sec. 6726, *Appendix.*

Indeed, it could simply have appealed and therein have advanced, not only its claim of *error* in the lower court's construction of the undertaking, but also the same claim made in its motion in the lower court, that the judgment was void for want of jurisdiction. By statute in Idaho, objection to the jurisdiction of the lower court is never waived, but may be raised in the Supreme Court for the first time.

Idaho Comp. Statutes, Sec. 6693, *Appendix;*
Aram v. Edwards, 9 Idaho 33.

We submit, not only that the petitioner was not denied its day in court, but that it has in fact had its day in court, with a *choice* of ample modes of procedure at its disposal. If so, it has had due process. It would seem that where the courts of a state are open to a party, *he cannot work a denial of due process by his own act* in choosing one form of procedure rather than another.

Blossom v. Railroad Co., 1 Wall. 655;
Iowa Central Railroad Co. v. Iowa, 160 U. S. 389;
Griggs v. Hanson, 86 Kans. 632.

We think it is demonstrated that this surety company, having voluntarily prepared and executed a contract of its own phrasing, and having voluntarily appeared and filed that document in the action in the state court, thereby became a party to the action and plainly consented to the terms and provisions of the Idaho statute which permitted it to become a party and to furnish such undertaking. If so, it should not now be heard to say that the proceeding thereafter had on that undertaking, conducted strictly in accordance with the statute and with the terms of the undertaking as well, deprived it of due process.

Finally, with particular reference to the closing paragraph of the petition for certiorari, we submit as demonstrated by the foregoing authorities, that the proceeding for summary judgment which occurred in this case is not "hitherto unheard of."

Also, without imposing further citations on this court, we feel it pertinent to suggest further that, under the foregoing authorities, the proceeding was distinctly not *ex parte*. The surety company was already a party to the litigation, having

become such by filing its undertaking. It was merely a well-recognized form of summary proceeding against one already voluntarily in court, pursuant to a contract entered into for a consideration.

III.

ALLEGED ERROR IN STATE COURT NOT REVIEWABLE IN FEDERAL COURTS

The petition herein seems to submit the further proposition, that the due process clause was infringed on in that, in petitioner's opinion, its supersedeas undertaking was susceptible of only one interpretation, to-wit: that the surety company did not agree to become liable if the original judgment should be affirmed in part only. At least, petitioner's statement of purported facts exhibits throughout a bald assumption that only one view of its agreement was possible.

There are several sufficient answers, we submit. First, the lower court must necessarily have consulted the undertaking in response to the motion for judgment thereon. Petitioner evidently contends that in so doing the court had authority to construe it *only one way*. This is manifestly incorrect. We submit as fundamental that if a court has lawful jurisdiction to adjudge a party not liable on his contract, it has equal authority to adjudge the contrary.

And see also:

Havens v. Stewart, 7 Idaho 298;
Boone v. District Court, 38 Idaho 691.

Second, due process goes only to the court's jurisdiction. If its construction of the petitioner's contract was legally unsound, such misconstruction did not affect the jurisdiction. Right decision is not a test of jurisdiction.

Fauntleroy v. Lum, 210 U. S. 230, 237.

> "The claim that the court, in disposing of some of the questions **** misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the 14th amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional

> questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."
>
> Enterprise Irrig. Dist. v. Farmers Mutual Canal Co., 242 U. S. 157, 165.

In another case this court used the following language, as to the effect of a judgment of a state court of general original jurisdiction:

> "A judgment in its nature concludes the subject in which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It puts an end to all inquiry into the fact by deciding it."

And further said that such judgments and conclusions are final,

> "unless revised on error or by appeal. *** There can be no judicial inspection behind the judgment save by appellate power."

And finally characterized the rule in question as an indispensable fundamental of jurisprudence resting on

> "the most sacred principles of the common law. Time has consecrated them; the courts of the states have followed, and this court has never departed from them."
>
> Grignon v. Astor, 2 Howard 319, 341-343.

The construction of petitioner's undertaking did not rest upon nor involve an interpretation of any Federal law. Neither did the court's view of the effect of the related facts, that the judgment appealed from was joint and not several, that a single appeal was taken by the debtors jointly, and that the recitals in the undertaking were in part incorrect. Right or wrong, that construction and the state court's judicial view of the related facts are not, we submit, reviewable in any Federal court. A case very much in point, wherein the state court had construed, and decided the legal effect of, a will and trust deed and the surrounding facts, is *Nickel v. Cole,* 256 *U. S.* 222.

Therein, at *page* 225, this court said:

> "Where, as here, there can be no pretense that the court adopted its view in order to evade a constitutional issue, and the case has been decided on grounds that have no relation to any Federal question, this court accepts the decision, whether right or wrong."

Finally, on this matter of the true legal meaning of the undertaking:

That undertaking was merely the surety company's original, independent contract with these respondents, as judgment creditors.

(R. 51, ff. 152-153.)

The Idaho Supreme Court has held herein that such contract, taken in conjunction with the related portions of the record in the state court and viewed in the light of the local law of Idaho governing judgments, appeals and supersedeas,

> "presented a legitimate question and was not an imposition or fraud upon the court." (R. 54, f. 152.)

If this view of the Supreme Court be controlling, then it was the manifest prerogative of the lower state court to construe the contract and so decide such legitimate question; and we are here submitting that the view of the highest court of a state as to the legal meaning and effect of a contract which forms the basis of a litigation in that court, is final, and not reviewable in the Federal courts.

We submit that, assuming error for the sake of the argument, the instant case belongs to that class that are "left to the appropriate remedies for the correction of errors in judicial proceedings."

Ainsworth v. Harmoning, 118 U. S. 194.

CONCLUSION

Primarily, we believe that the record discloses a liability on the part of the surety company which obligates it to pay respondents in accordance with the judgment against it.

Secondly, the contention of petitioner finally resolves itself into a claim of error rather than a denial of due process of law which, if existent, should be corrected upon appeal to

the Supreme Court of Idaho in accordance with the state statutes and not by application for a writ of certiorari to this Honorable court.

Respectfully submitted,

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J. R. SMEAD,
Counsel for Respondents.

APPENDIX

Section 6693 (4178). When objections deemed waived. If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Section 6726 (4229). General power to permit amendments, relieve from defaults, etc. The court may, in furtherance of justice and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect, and may upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow upon such terms as may be just an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this Code, *and also relieve a party, or his legal representative, from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect;* and whenever, for any reason satisfactory to the court or the judge thereof, the party aggrieved has failed to apply for the relief sought during the term at which such judgment, order or proceeding complained of was taken, the court, or the judge thereof in vacation, may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term. Whenever any judgment, order or proceeding is taken against a party otherwise without default, through the neglect or failure of any attorney of such party to file or serve any paper within the time limited therefor, the court, or the judge thereof, in vacation, shall, upon application filed within the time above limited, set aside such judgment, order or proceeding and may, in its discretion, require the attorney guilty of such failure or neglect to pay the costs or expenses actually and necessarily occasioned to the opposite party by such failure or neglect, and may, in its discretion, also impose upon such attorney a penalty of not exceeding $100.00. When from any cause the summons in an action has not been personally

served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property and the officer taking the property or the sureties on any bond or undertaking, is sued for taking the same, the officer or sureties may, in their answer, set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit and give judgment according to the right of possession of said property at the time the affidavit was made. (Italics ours.)

Section 7151 (4802). Who may appeal: Designation of parties. Any party aggrieved may appeal in the cases prescribed in this code. The party appealing is known as the appellant, and the adverse party as the respondent.

Section 7152. Time for taking appeals. An appeal may be taken to the supreme court from a district court:

1. *From a final judgment in an action or special proceeding commenced in the court in which the same is rendered;* from a judgment rendered on an appeal from an inferior court; from a judgment rendered on an appeal from an order, decision or action of a board of county commissioners; within 90 days after the entry of such judgment. (Italics ours.)

2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of place of trial; from any special order made after final judgment; and from an interlocutory judgment in action for partition of real property; within 60 days after the order or interlocutory judgment is made and entered on the minutes of the court, or filed with the clerk.

Section 7155 (4810). Same: Supersedeas: Money Judgment. If the appeal be made from a judgment or order directing the

payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent in his favor, against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than $2000, and the sureties do not state in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as, in their affidavits, they may state they are severally worth, and the judgment may be entered against the sureties by the court from which the appeal is taken pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency.